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ENVIRONMENTAL PROTECTION AGENCY

AGENCY: Environmental Protection Agency.

40 CFR Parts 122, 123, 124, 125, 130 and 403

National Pollutant Discharge Elimination System Permit Regulations

[FRL 3405-2]

54 FR 246

January 4, 1989

ACTION: Final rule.

SUMMARY: On February 4, 1987, Congress enacted the Water Quality Act of 1987 (WQA), which revised the Clean Water Act (CWA). This new statute makes a number of changes to EPA's existing National Pollutant Discharge Elimination System (NPDES) permit and pretreatment programs under section 402 of the CWA, and includes modifications to other CWA provisions as well. Today's rules revise EPA's existing NPDES, pretreatment, and water quality regulations to reflect statutory changes which supplement or supersede existing regulatory requirements.

These rules also change existing NPDES regulations to reflect recent court decisions and contain corrections of typographical errors, incorrect cross-references, and inadvertent omissions or additions of language in previous regulations implementing the NPDES permit program. These earlier regulations were published at 50 FR 6939 (February 19, 1985), 49 FR 37998 (September 26, 1984), 49 FR 31840 (August 8, 1984), 48 FR 39611 (September 26, 1983), 48 FR 14146 (April 1, 1983), and 47 FR 53685 (November 26, 1982).

EFFECTIVE DATE: These rules become effective January 4, 1989.

ADDRESSES: Comments should be addressed to: David Greenburg, Permits Division (EN-336), Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The supporting information and all comments on this rulemaking will be available for inspection and copying at the EPA Public Information Reference Unit, Room 2402. The EPA public information regulation (40 CFR Part 2) provides that a reasonable fee may be charged for copying.
FOR FURTHER INFORMATION CONTACT: David Greenburg at (202) 475-9524, Permits Division (EN-336), Office of Water Enforcement and Permits, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

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I. Background

On February 4, 1987, Congress enacted the Water Quality Act of 1987 (WQA), which amends the Clean Water Act (CWA). The Water Quality Act makes a number of adjustments to the NPDES program.

Many of the changes necessitate revisions to the NPDES regulations. This rule contains changes which incorporate specific provisions from the Water Quality Act into existing NPDES regulations. Today's rulemaking also makes revisions to the NPDES regulations in response to recent court decisions by the U.S. Court of Appeals for the District of Columbia Circuit.

In addition to today's final rule, EPA is also preparing companion rulemakings which will propose modifications to existing regulations to implement other provisions of the WQA and court orders. These companion proposals will supplement the new provisions, as well as codify the remaining statutory language. EPA has codified in this rulemaking only those statutory provisions which can stand alone and out of context. In some cases, implementation of specific provisions of the WQA amendments will involve both codification of explicit statutory requirements and notice and comment rulemaking to implement those parts of the statute where the Agency has discretion to act. Where these are inextricably intertwined, EPA has decided to defer codification in favor of a combined notice and comment rulemaking. This will avoid confusion which may arise from a piecemeal approach. Because the principal purpose of today's rule is to codify the new statutory requirements of the WQA, today's rulemaking is properly classified as an interpretive rule, *see, United Technologies Corporation v. EPA*, 821 F. 2d 714, 718 (D.C. Cir. 1987), in that it "simply states what (EPA) thinks the [underlying] statute means and only 'reminds' affected parties of existing duties." quoting *Citizens to Save Spencer County v. EPA*, 600 F. 2d, 844, 876 n. 153 (D.C. Cir. 1979). It does not intend "to create new law, rights or duties." *Id.*

If the rule is based on specific statutory provisions, and its validity stands or falls on the correctness of the agency's interpretation of those provisions, it is an interpretative rule. If, however, the rule is based on an agency's power to

exercise its judgment as to how best to implement a general statutory mandate, the rule is likely a legislative one. *United Technologies, supra,* at 719-20.

Today's final rule conforms to the Court's definition of an interpretative rule by revising existing regulations to implement the new statutory provisions. In most instances, EPA has codified the relevant statutory language. EPA recognizes that many of these provisions raise interpretive questions. EPA has avoided adding regulatory language to resolve interpretive questions. This is in keeping with EPA's view that the principal purpose of today's rule is to codify the new statutory requirements. EPA has articulated in the preamble, however, its view of what Congress intended these new requirements to be. Such statements of statutory interpretation are derived from legislative history and EPA's view of Congressional purposes for the new requirements.

The Administrative Procedure Act (APA) specifically excludes "interpretative" rules from its notice and comment procedures. 5 U.S.C. 553(b)(A) (1982). In addition, while EPA recognizes the importance of public comment in its rulemaking activity, the Agency believes that notice and comment is unnecessary because the "good cause" exception to the APA notice and comment requirement is applicable. The Administrative Procedure Act, 5 U.S.C. 551, *et seq.,* specifically recognizes that there will be situations where an administrative agency need not go through a round of public comment before issuing a rule. Under 5 U.S.C. 553(b)(B), a rule is exempt from notice and public comment requirements "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedures thereon are impractical, unnecessary, or contrary to the public interest."

The Administrative Conference of the United States has summarized the case law on the issue of the "good cause" exemption, saying in relevant part that the exemption is warranted where: "* * * delay in promulgation will cause an injurious inconsistency between an agency rule and a newly enacted statute or judicial decision." ACUS Rec. 83-2: The "Good Cause" Exemption from APA Rulemaking Requirements, 1 CFR Part 305.83-2 (1984).

EPA believes the good cause exemption from the notice and comment requirements of the EPA is properly invoked here for the following reasons. The limited objective of this rule is to assure that the Code of Federal Regulations (CFR) accurately reflects the current requirements of the Water Quality Act. This serves important public policy and regulatory objectives. It eliminates any confusion on the part of the regulated community, which relies on the CFR as an accurate reflection of the controlling statutory requirements. It assures that the regulated community is aware of the new requirements and fully understands the impact of the requirements upon permitted facilities. In addition, many permits include citations to specific provisions of the federal regulations. Many State regulatory programs are modeled after EPA's regulations; some States even incorporate EPA's regulations by reference.

Today's rulemaking will eliminate many questions concerning implementation of the WQA, and will clarify in a number of areas which parts of the existing regulations are superseded by new requirements.

Moreover, it is essential to the Agency's enforcement program that the CFR accurately reflect the statutory requirements imposed on the regulated community by the WQA. Immediate codification of WQA requirements will put regulated parties on notice of their legal responsibilities and potential liabilities, without the potential for confusion that might arise in the event that a conflict is perceived between the requirements of the Act and those contained in the CFR. By reducing confusion about the program and clarifying permittees' responsibilities under the CWA, EPA is ultimately serving the basic purposes of the statute -- the protection of human health and the environment. It also promotes certainty and encourages efforts by responsible segments of the regulated community to move ahead to meet their responsibilities. By the same token, it prevents other members of the regulated community from using confusion as an excuse not to comply with the law.

For the reasons discussed above, EPA has concluded that to the extent this rule is deemed a legislative rule rather than an interpretive rule there is good cause to issue it without receiving public comment in accordance with 5 U.S.C. 553(b)(B), because under the circumstances, notice and comment procedures would be impracticable, unnecessary, and

contrary to the public interest. For the same reasons, EPA believes that it has good cause to make today's rule immediately effective, as provided in 5 U.S.C. 553(d)(3).

## II. Analysis of Regulatory Changes

### *A. Definitions*

#### 1. Point Source

Prior to passage of the WQA, the definition of "point source" in the CWA was very broad, encompassing any discharge of pollutants from a "discernible, confined and discrete conveyance." EPA has in practice interpreted this definition to include landfill leachate collection systems, since they channel runoff from landfills. Section 507 of the WQA confirmed EPA's interpretation by amending the statutory definition of point source to explicitly include landfill leachate collection systems. Accordingly, today's rulemaking revises EPA's existing definition of point source in § 122.2 by inserting the phrase "landfill leachate collection system."

#### 2. Agricultural Storm Water Discharges

Section 503 of the WQA amended section 502(14) of the CWA to expressly exclude from the definition of point source agricultural storm water discharges. Thus, these discharges are not subject to NPDES permit requirements. Today's rule amends the existing definition of point source in § 122.2 to incorporate this statutory exclusion.

EPA's regulations had previously excluded certain agricultural and silvicultural discharges, which EPA defined as non-point, from the requirement to obtain an NPDES permit (see § 122.3(e)). This exclusion had been challenged by the Natural Resources Defense Council (NRDC) in *NRDC v. EPA*, No. 80-1607 (filed June 3, 1980) as being beyond EPA's authority. In view of the new statutory exclusion for agricultural storm water discharges, the U.S. Court of Appeals for the District of Columbia Circuit dismissed NRDC's challenge to § 122.3(e) as moot.

Today's revision clarifies that the exclusion in § 122.3(e) includes agricultural and silvicultural storm water discharges. Silvicultural point source discharges under § 122.27 are still required to obtain NPDES permits. For consistency, EPA is also adding a reference to § 122.3(e) in the definition of point source.

#### 3. State

Section 502 of the WQA amends the definition of "State" in § 502(3) of the CWA to include the Commonwealth of the Northern Mariana Islands. The rule promulgated today implements this statutory provision by revising EPA's existing definition in 40 CFR 122.2 and 124.2 to include the Commonwealth of the Northern Mariana Islands. The Northern Marianas will be treated like any State under the Clean Water Act and can apply to administer the NPDES program.

### *B. Storm Water Permit Requirements*

Sections 401 and 405 of the WQA address the NPDES permit program for storm water discharges and amend section 402 of the CWA by modifying paragraph (1) and adding a new paragraph (p). Today's rule incorporates both the statutory language of section 402(1)(2) relating to storm water runoff from oil, gas, and mining operations as well as the provisions of section 402(p)(1)-(p)(3) regarding municipal and industrial storm water discharges. This rulemaking codifies these WQA amendments as new regulatory provisions at § 122.26. The previous storm water provisions at § 122.26 and accompanying deadline provisions at § 122.21(c)(2) were recently withdrawn by the Agency in response to a D.C. Circuit Court of Appeals order in *NRDC v. EPA*, No. 80-1607 (December 4, 1987) (See 53 FR 4157, February

12, 1988). EPA has recently proposed NPDES application and designation requirements for storm water discharges under sections 402(p) (4) and (6) at 53 FR 49416 (December 7, 1988).

1. Section 402(1)(2)

Section 402(1)(2) prohibits EPA from requiring an NPDES permit for discharges of storm water runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and, which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations. Today's rule codifies this limitation on NPDES permitting authority at § 122.26(a)(3).

The legislative history accompanying this provision explains that "[w]ith respect to oil or grease or hazardous substances, the determination of whether storm water is contaminated by contact with such materials, as established by the Administrator, shall take into consideration whether these materials are present in such storm water runoff in excess of reportable quantities under section 311 of the Clean Water Act or section 102 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 or in the case of mining operations, above natural background levels." (Conference Report, H 10574 *Cong. Rec.*, (daily ed. Oct. 15, 1986). The Agency will address the scope of this provision in future rulemaking.

2. Section 402(p)

Section 402(p) contains a number of important provisions and requirements relating to the issuance of NPDES permits for municipal and industrial storm water discharges. Today's rule codifies subsection 402(p)(1) at § 122.26 and provides that neither federally-administered nor approved State NPDES programs may require a permit for discharges composed entirely of storm water prior to October 1, 1992, unless the discharge falls within a list of five exceptions set forth in subsection 402(p)(2). These exceptions are also codified in today's rule and include the following storm water discharges:

(A) A discharge with respect to which a permit has been issued prior to February 4, 1987;

(B) A discharge associated with industrial activity;

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more;

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more, but less than 250,000; or

(E) A discharge which the Administrator or the State, as the case may be, determines contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the United States.

The last exception at 402(p)(2)(E) provides the Administrator or the State, as the case may be, with authority to designate storm water discharges for a permit on a case-by-case basis. This authority can be used to require a designated storm water discharge associated with industrial activity or a discharge from a municipal separate storm sewer system serving a population of greater than 100,000 to obtain a permit prior to the development of permit application requirements for the particular class of storm water discharges in question. In addition, the authority applies to designated storm water discharges that are not otherwise required to obtain a permit prior to October 1, 1992 under section 402(p)(1).

In determining that a storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States for the purpose of a designation under Section 402(p)(2)(E) of

the amended CWA, the legislative history for the Water Quality Act provides that "EPA or the State should use any available water quality or sampling data to determine whether the latter two criteria [of section 402(p)(2)(E)] are met, and should require additional sampling as necessary to determine whether on not these criteria are met." Conference Report, *Cong. Rec.* S16443 (daily ed. October 16, 1986). In accordance with this legislative history, EPA intends to require designated storm water dischargers to submit permit applications in accordance with the requirements of 40 CFR 122.21. The Agency will consider a number of factors when determining whether a storm water discharge is a significant contributor of pollutants to the waters of the United States. These factors include: the location of the discharge with respect to waters of the United States; the size of the discharge; the quantity and nature of the pollutants reaching waters of the United States; and any other relevant factors. As noted above, EPA has proposed a rulemaking to address NPDES application and designation requirements for storm water discharges. These factors are included in that rulemaking.

Until EPA conducts additional rulemaking under § 405 of the Water Quality Act, case-by-case designations of storm water discharges requiring a permit will be modeled on existing regulatory procedures found at § 124.52 [for permits required on a case-by-case basis]. The procedures at § 124.52 require the Regional Administrator to notify the discharger in writing of the decision that the discharge requires a permit and the reasons for the decision. In addition, an application form is to be sent with the notice. Deadlines for submitting permit applications will be established on a case-by-case basis. Although the 60 day period provided for submitting a permit application under § 124.52 may be appropriate for many designated storm water discharges, additional time may be necessary depending upon site specific factors. For example, due to the complexities associated with determining whether a municipal, separate storm sewer system requires a permit, the Regional Administrator may provide the applicant with additional time to submit relevant information or may require that information be submitted in several phases.

The WQA also adds subsection 402(p)(3)(B)(i) to clarify that permits for municipal storm sewer discharges may be issued on a system or jurisdiction-wide basis. Today's rule codifies this clarification at § 122.26(a)(2).

A number of other provisions of Section 402 are not being codified in today's rule but still warrant discussion.

Section 402(p)(4) requires EPA to promulgate final regulations governing storm water application requirements for storm water discharges associated with industrial activity and discharges from municipal storm sewer systems serving a population of 250,000 or more by "no later than two years" after the date of enactment (i.e., no later than February 4, 1989). This provision also requires EPA to promulgate final regulations governing storm sewer permit application requirements for discharges from municipal separate storm sewer systems serving a population of 100,000 or more but less than 250,000 by "no later than four years" after enactment (i.e., no later than February 4, 1991).

In addition, section 402(p)(4) provides that permit applications for storm water discharges associated with industrial activity and large municipal separate storm sewer systems "shall be filed no later than three years" after the date of enactment of the WQA (i.e., no later than February 4, 1990). Permit applications for discharges from medium-sized municipal systems must be filed "no later than five years" after enactment (i.e., no later than February 4, 1992).

NPDES permits for all other storm water discharges are not required until October 1, 1992, unless a permit for the discharge was issued prior to the date of enactment of the WQA (i.e., February 4, 1987), or the discharge is determined to be a significant contributor of pollutants to waters of the United States or is contributing to a violation of a water quality standard.

In addition, EPA, in consultation with the States, is required under section 402(p)(5) to conduct two studies on storm water discharges. The first study will identify those storm water discharges or classes of storm water discharges for which permits are not required prior to October 1, 1992 and determine, to the maximum extent practicable, the nature and extent of pollutants in such discharges. This study was due by October 1, 1988. The second study will establish procedures and methods to control storm water discharges to the extent necessary to mitigate impacts on water

quality. This study was due by October 1, 1989. Based on the two studies, EPA, in consultation with State and local officials, is required to issue regulations by no later than October 1, 1992 which designate additional storm water discharges to be regulated to protect water quality and establish a comprehensive program to regulate such designated sources. The program must, at a minimum, (A) establish priorities, (B) establish requirements for State storm water management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

*C. Deadline Extensions*

1. Compliance Dates

Section 301 in the WQA revises the compliance deadlines in § 301 of the CWA for the technology-based requirements of the CWA. The NPDES regulations in § 125.3 currently reflect compliance deadline requirements prior to the WQA. Under the existing rules, the compliance date for limits based on best practicable control technology currently available (BPT) is the date of permit issuance. For conventional pollutants subject to limitations based upon best conventional pollutant control technology (BCT) and for all toxic pollutants identified under CWA section 307(a) (listed at 40 CFR 401.15) and subject to limitations based upon best available technology economically achievable (BAT), compliance was required by July 1, 1984. For all other toxic pollutants subject to effluent limitations based on BAT, compliance was required no later than three years after the date such effluent limitations were incorporated into an NPDES permit. For BAT effluent limitations on other pollutants (i.e. nonconventionals), compliance was required no later than three years after the date such effluent limitations were incorporated into an NPDES permit, or July 1, 1984, whichever was later, but in no case later than July 1, 1987.

The WQA revises certain deadlines for compliance with permits containing effluent limitations based upon BPT, BAT and BCT. Compliance with permit effluent limitations established based on BAT or BCT is required as expeditiously as practicable but in no case later than three years after the date such limitations are instituted, and in no case later than March 31, 1989.

The deadline for BPT effluent limitations continues to be July 1, 1977. However, the WQA sets a later deadline where EPA promulgates an effluent limitation after January 1, 1982 and the revised limitation requires a level of control substantially greater or is based on fundamentally different control technology than required in permits issued for the industrial category prior to January 1, 1982. Compliance for this second category of BPT effluent limitations is required as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 304(b) and in no case later than March 31, 1989.

For permits based upon best professional judgment (BPJ) issued after enactment of the WQA (February 4, 1987), compliance is required as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989. For BPJ permits issued before enactment of the WQA, compliance continues to be required in accordance with the Section 301(b)(1)(A), 301(b)(2)(A) and 301(b)(2)(E) deadlines in effect when the permit was issued.

Today's rule implements the statutory amendment by revising EPA's existing § 125.3(a)(2)(i)-(v) to extend the compliance deadline for each of the above mentioned categories.

2. POTW Application Deadline

Section 304 of the WQA reopens, for 180 days after enactment, the deadline for POTWs to apply under section 301(i)(1) of the CWA for extensions of the 1978 date by which secondary treatment and water quality standards in effect prior to 1977, must be achieved. The Administrator may extend this compliance deadline until no later than July 1, 1988. Many eligible POTWs applied for the 301(i) extension in 1977 and 1978. Congress enacted section 304 of the WQA to allow POTWs that did not apply in a timely manner for a 301(i) extension another chance to submit an

application. Treatment works on a compliance schedule established by a court order or final Agency (or State) order prior to February 4, 1987 were not eligible to apply for an extension under WQA section 304.

Even though the deadline for this extension is past, EPA is amending the existing regulations to conform to the statute in Section 301(i). This will assure that the regulations accurately reflect the statute. This statutory provision is implemented in today's rule by revising existing §§ 122.21(n)(2) and 122.21(m)(3). Section 122.21(n)(2) is revised to change the POTW filing deadline for a 301(i)(1) extension, from June 26, 1978 to August 3, 1987. Thus, the change in the application deadline effectively changes § 122.21(m)(3) by reopening the time period in which an industrial facility planning to discharge through a municipal treatment works that has requested an extension under 301(i) can apply for a 301(i)(2) extension. The deadline for these industrial dischargers is extended to January 30, 1988 (180 days after the POTW can request a 301(i) extension for delay in construction under § 122.21(n)(2)).

3. Innovative Technology

This codification incorporates WQA changes with respect to facilities proposing to use innovative technology to meet applicable BAT effluent limitations. Prior to passage of the WQA, the deadline for compliance with such effluent limitations by facilities using innovative technology under § 301(k) of the CWA was July 1, 1987. This date is currently found at 40 CFR 125.21, 125.23, 125.24 and 125.27. Section 305 of the WQA amends section 301(k) of the CWA, to allow the Administrator (or the State with an approved program, in consultation with the Administrator) to establish a date for compliance no later than 2 years after the date for compliance with the effluent limitation which would otherwise be applicable. This codification changes §§ 125.21, 125.23, 125.24, and 125.27 to reflect the statutory change.

Prior to the 1987 amendments, the 301(k) deadline extension was available only for compliance with BAT limits. Many facilities subject to BAT also were required to meet limits for conventional pollutants based upon best conventional pollutant control technology (BCT) and used the same treatment equipment in meeting both limits. These facilities were essentially barred from obtaining 301(k) extensions because of the requirement to meet BCT. The WQA expands the scope of section 301(k) to allow an extension where the permittee is using innovative technology for compliance with BCT. EPA is not, however, revising Subpart C of Part 125 to reflect these changes in today's rulemaking. These revisions will be addressed along with a number of additional issues in connection with section 301(k) in subsequent notice and comment rulemaking. In that rulemaking, EPA plans to define the term "significantly greater effluent reduction" for purposes of BCT. As part of that rulemaking, EPA also plans to propose regulations addressing the amendment to section 307(e) of the CWA (§ 309 WQA) which authorizes a compliance deadline extension for indirect dischargers who install an innovative technology. In addition, EPA will address specific substantive criteria for evaluating 301(k) compliance extensions. EPA proposed these criteria in 1985 pursuant to a remand in *NRDC v. EPA*, No. 84-1500 (D.C. Circuit, April 16, 1985). See 50 FR 49904, December 5, 1985. That earlier proposal was not finalized, however, and will be reproposed as part of the upcoming more general notice and comment rulemaking.

*D. Industrial Variances*

1. General Note on Fundamentally Different Factors Variances

Regulations establishing Fundamentally Different Factors (FDF) variances for BPT, BAT, BCT, and PSES are found at 40 CFR 125, Subpart D and 40 CFR 403.13. In the WQA, the Congress established an explicit statutory scheme for FDFs, as applied to BAT, BCT and PSES. In a future rulemaking, EPA intends to propose amendments to the substantive criteria for FDF variances consistent with the requirements of section 301(n) of the CWA for direct (40 CFR Part 125, Subpart D) and indirect (40 CFR 403.13) dischargers. The Agency will also address the regulatory authority for granting variances from BPT. However, because the legislative history of the WQA indicated that Congress intended the FDF variance provisions to be self-implementing (Conference Report, 132 H.10567, *Cong. Rec.*,

Oct. 15, 1986) EPA is using the new FDF statutory criteria under section 306 of the WQA, when appropriate, on a case-by-case basis in addressing FDF variance requests.

2. Application Requirements for Fundamentally Different Factors Variance Requests

The existing NPDES regulation at § 122.21(m)(1) requires that a Fundamentally Different Factors (FDF) variance request be submitted by the close of the public comment period on the draft permit. The existing filing deadline will continue to be used for FDF variance requests from BPT effluent guidelines. However, where variances are requested from best available technology economically achievable (BAT) and best conventional pollutant control technology (BCT), the WQA establishes a new filing deadline in section 301(n)(2) of the CWA. The statute requires submission of an FDF application within 180 days after the date that the limitation from which the variance is sought is established or revised; EPA considers the date of the establishment of such limitation as the date the guideline or standard is published in the Federal Register. This is consistent with the Conference Report (132 H.10566, Oct. 15, 1986) which states that "an application under this section shall be submitted within 180 days after the publication of the initial guideline or standard" and EPA's handling of requests for relief under sections 301(c) and 301(g) of the Act (40 CFR 122.21(m)(2)) within 270 days after promulgation of an effluent guideline.

The statute is not clear when BAT and BCT FDF variance requests are due for those effluent guidelines established or revised before February 4, 1987. Such facilities previously were guided by EPA's regulations which, as stated above, allowed FDF requests to be submitted by the close of the public comment period on the draft permit. EPA will provide a period, not to exceed 180 days after publication of this final rule, to allow such facilities to file a request. (Only facilities for which the previously applicable filing deadline has not passed can make these FDF requests. The previously applicable filing deadline is the close of the draft permit's comment period.) This time period mirrors the time period for filing established by the statute, and will allow those whose time period to file a FDF variance request has not otherwise passed an opportunity to file such a request. EPA has modified the second sentence of the previously applicable provision and designated the sentence as § 122.21(m)(1)(ii), to indicate that FDF variance requests shall explain how applicable regulatory and/or statutory criteria are satisfied.

The general pretreatment regulations at 40 CFR 403.13(g) previously also contained application deadlines for FDF variance requests for indirect dischargers. Therefore, EPA has made changes to these regulations, as well, to reflect the statutory provision. Included in these changes is the provision requiring the submission of an application within 180 days after the date an applicable categorical pretreatment standard is established or revised. As indicated above, EPA considers the date of the establishment as the date the standard is published in the Federal Register; this is a change from the previous regulatory requirement which was based upon the effective date of the categorical pretreatment standard.

3. Availability of Section 301(g) Variances

Section 302 of the WQA modified section 301(g) of the CWA to limit section 301(g) variance requests to five specific non-conventional pollutants (ammonia, chlorine, color, iron and total phenols (4AAP) (when the Administrator determines total phenols to be a pollutant covered by CWA section 301(b)(2)(F)). Additional non-conventional pollutants may be added to this group by the Administrator in response to petitions, under a new listing procedure specified in section 301(g)(4) of the CWA. Section 122.21(m)(2) is being revised to reflect this amendment. The current regulation does not list the five specific non-conventional pollutants and allows variances "pursuant to section 301(g) of the CWA, because of certain environmental considerations, when those requirements were based on effluent guidelines." The WQA did not revise application deadlines for section 301(g) applications which are based on section 301(j)(1)(B) of the CWA.

It has been brought to the Agency's attention that Congress did not specify how the time limit for filing the petitions for listing referenced above was to be applied to currently-pending 301(g) variance requests. EPA is only aware of one pending 301(g) variance application which requested relief for a non-conventional pollutant which was not one of the

five listed pollutants. EPA will deal with this, and any other dischargers in a similarly situated position, on a case-by-case basis.

The WQA specifies deadlines for EPA decisionmaking. For example, section 301(j)(4) requires EPA to make a final decision on 301(g) applications within 365 days of filing a submission under 301(g). Because an application may be filed without being complete, the deadline for decisionmaking could pass without a complete application ever being filed. It is only logical to imply a deadline for completion of the application before EPA's decision must be made. Therefore, EPA is revising § 122.21(m)(2)(i)(B) to clarify that the complete application must be filed in sufficient time, as determined by the Regional Division Director, to allow compliance with the decision timing requirement contained in section 301(j)(4) of the CWA. Generally, this period will require submission of the complete application no later than 180 days before the deadline for EPA to issue a decision.

EPA notes that it proposed, but has not to date finalized, substantive criteria regulations (40 CFR Part 125, Subpart F) for section 301(g) on August 7, 1984 (49 FR 31462).

4. State Concurrence on Fundamentally Different Factors and Section 301(g) Variances

Sections 301(g) and 301(n) of the CWA require State concurrence on sections 301(g) and 301(n) variance approvals. The NPDES regulations at § 124.62(e) are being revised to indicate that EPA will act on FDF or 301(g) variance requests which have been submitted to the State Director only after approval of the request by the State Director. EPA notes that in the case of a State that does not have the NPDES program, the variance request should be submitted to EPA, which will then forward the request to the appropriate State agency for concurrence; State concurrence must be obtained before EPA can approve either a 301(g) or 301(n) variance.

The general pretreatment regulation at § 403.13(k) does not authorize a State Director to forward a FDF variance request for an indirect discharger without a recommendation of approval, which EPA interprets to be the State's concurrence. Therefore, no change has been made to this provision. EPA again notes that in the case of a State that is not approved to administer the pretreatment program, State concurrence must be obtained before EPA will finally approve the FDF variance request.

*E. Penalties*

The WQA makes a number of changes to the civil and criminal penalty provisions of the CWA and adds an administrative penalty provision. The WQA adds CWA § 405 to the list of sections for which criminal penalties are applicable, and confirms the availability of civil and criminal penalties for violations of pretreatment requirements. Section 313 of the WQA amends CWA § 309(d) to provide that violators of CWA sections 301, 302, 306, 307, 308, 318 or 405, or any condition or limitation in an NPDES permit, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8), are subject to a maximum civil penalty of "$25,000 per day for each violation," in contrast to the previous maximum of "$10,000 per day of such violation."

Section 312 of the WQA amends section 309(c)(1) of the CWA, increasing the penalty for any person who negligently violates section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any of these sections in an NPDES permit, or any requirement imposed in a pretreatment program under section 402(a)(3) or 402(b)(8). Negligent violations of these provisions are subject to criminal penalties of $2,500 to $25,000 per day of violation or up to one year in prison, or both. A second offense under these provisions may be subject to penalties of not more than $50,000 per day of violation or imprisonment of up to two years, or both.

Section 312 of the WQA also amends section 309(c) of the CWA by increasing the criminal penalties for knowing violations of sections 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any such section in an NPDES permit, or any requirement imposed in a pretreatment program under section 402(a)(3) or 402(b)(8). Knowing violations of these provisions are subject to criminal penalties of $5,000 to

$50,000 per day of violation or up to three years in prison, or both. A second offense under these paragraphs may be subject to penalties of not more than $100,000 per day of violation or imprisonment of up to six years, or both.

The WQA also creates a new class of knowing violations. In the event of a knowing violation placing another person in imminent danger of death or serious bodily injury, individuals are subject to penalties of up to 15 years in prison or fines of up to $250,000, or both. Organizations are subject to fines of up to $1 million. Individuals committing a second offense under this paragraph may be subject to penalties of not more than $500,000 or 30 years in prison, or both. Organizations are subject to fines of up to $2 million. Section 309(c)(3)(B)(iii) of the CWA defines the term "organization" for the purpose of this provision.

Section 314 of the WQA adds section 309(g) to the CWA. This provision allows the Administrator to assess administrative penalties against persons violating section 301, 302, 306, 307, 308, 318 or 405 of this Act, or any permit condition or limitation implementing any such section in a permit issued under section 402. Section 314 also provides administrative penalty authority for violations of State-issued permits under CWA section 404. Today's rulemaking, however, does not address penalty authority for violations of section 404. Section 314 creates two classes of penalties. Penalties for Class I violations are not to exceed $10,000 per violation, with the maximum amount assessed not to exceed $25,000. Penalties for Class II violations are not to exceed $10,000 per day for each day during which the violation continues, with the maximum amount not to exceed $125,000.

EPA is revising § 122.41(a) (2) and (3) to reflect these changes. Section 122.41 sets out standard conditions that must be included in all permits. This language merely puts permittees on notice as to the applicable enforcement provisions of the CWA.

Section 312(c)(4) of the WQA increases the maximum penalty for knowingly making any false statements from six months to two years. The existing fine of not more than $10,000 for first time false statements remains unchanged, but maximum penalties are doubled for second offenses. EPA is revising the language set out in § 122.41(j)(5) to reflect the requirements of the WQA.

*F. Anti-Backsliding*

EPA regulations in § 122.44(l) have generally prohibited the issuance of a permit with limitations less stringent than those in the previous permit, except in certain circumstances. The primary application of these rules has been to prohibit backsliding from permits written on a case-by-case basis under CWA section 402(a)(1) using best professional judgment (BPJ) to less stringent subsequently promulgated effluent limitations guidelines (see § 122.44(l)(2)).

In section 404 of the WQA, Congress added section 402(o) to the CWA to clarify the Congressional intent that backsliding from BPJ limits to such subsequent guidelines was prohibited. Congress also listed several exceptions to the prohibition. In general, these exceptions tracked the existing NPDES anti-backsliding rules applicable to BPJ permits. However, some of the exceptions have been changed or limited by the amendment and today's rulemaking is revising §§ 122.44(l)(2) and 122.62(a) to reflect these differences. Specifically, § 122.62(a)(15) which allowed a BPJ permit to be modified due to excessive costs is not authorized by the statute and is being deleted. The other exceptions in § 122.44(l)(2) are being conformed to the amendment. In addition, EPA is adding the limitation from CWA section 402(o)(3) prohibiting the issuance of a permit less stringent than existing effluent guidelines or applicable State water quality standards.

The WQA also adds a prohibition against backsliding from water quality-based permits except in limited circumstances. Today's revision does not implement this prohibition. EPA plans to propose rules to implement the prohibition against backsliding from water quality-based permit limits in the near future. EPA's regulation at § 122.44(l)(1) restricts backsliding in cases not covered by the WQA amendments. EPA is not planning any rulemaking to revise this broader prohibition.

*G. Inspection and Entry*

In Section 310 of the WQA (amending § 308 of the CWA) Congress confirms EPA's practice of allowing contractors to represent the Administrator for purposes of entering and inspecting permitted facilities. The rule promulgated today revises EPA's existing standard permit conditions on entry and inspection under Section 308 (§ 122.41(i) of the regulations) to insert the statutory language from Section 310.

*H. Sewage Sludge*

Previously, the CWA regulated sludge through the NPDES program only when the sludge was discharged into surface water from a point source. In the case of publicly owned treatment works, the CWA prohibited disposal of sludge except in accordance with national criteria controlling disposal. Section 406 of the WQA amends section 405 of the CWA to expand the applicability of the sewage sludge criteria promulgated under this section to include sludge from any treatment works that treats domestic sewage, whether publicly or privately owned. Further, the amendments direct that any NPDES permits issued must include the sewage sludge criteria. Today's rulemaking revises existing § 122.44(o) by inserting a phrase to specify all treatment works treating domestic sewage are subject to national regulations controlling its disposal. Two future rulemakings will establish EPA's sludge management program. One rulemaking will propose technical standards for the use and disposal of sewage sludge; the other will establish sludge permitting requirements and requirements for approving state sludge management programs. A proposal for this second rulemaking appeared at 53 FR 7642 (March 9, 1988).

*I. Partial NPDES Programs*

Section 403 of the WQA amends CWA section 402 to allow States to seek partial NPDES approval in certain circumstances. Partial approval is approval of a program which does not include NPDES, pretreatment and federal facilities authority over all facilities in the State subject to these programs. The amendment provides for two types of partial program approval. The first is intended for circumstances where jurisdiction over all direct and indirect wastewater discharges in the State is split between two or more State agencies. The amendment requires the program to cover at a minimum administration of a major category of discharges into the navigable waters of the State. The partial program must also represent a significant and identifiable part of the State program required by CWA § 402(b), and encompass all discharges under the jurisdiction of the State agency or agencies. The second type of partial program authorized is the "partial and phased" program. This requires initial approval of a major component of a State program (which also must represent a significant and identifiable part of the State program), with the State assuming the remaining program elements in phases. A State choosing this latter approach must submit a plan for assumption of the full program by a specified date not more than 5 years after submission of the partial program. To distinguish between the two types of partial programs authorized by the WQA, EPA will refer to the first as "partial" and the latter as "phased" in this and subsequent rules.

The existing regulation at § 123.1(g) expressly prohibits EPA from approving partial programs. As a first step towards implementing the amendment, today's rule deletes the existing regulatory provision prohibiting partial programs in § 123.1(g) and revises that provision to clarify that EPA will not accept partial or phased program submissions.

EPA will propose additional rules that will explain how a State can apply for and receive partial or phased program authority in a future rulemaking.

*J. 304(l) Toxic Control Strategies*

Section 308 of the WQA amends CWA section 304 by creating a new section 304(l). This provision requires States to develop lists of impaired waters, identify point sources and amounts of pollutants they discharge that cause violations of water quality standards and develop and implement individual control strategies for each such point source. The Agency is preparing a companion rulemaking that will address more completely the requirements of § 304(l).

1. Identification of Polluted Waters

Paragraph (A) of Section 304(l)(1) requires States to submit to EPA two lists of waters. These lists include those waters within the State which, after application of BAT or BCT, cannot reasonably be anticipated to attain or maintain (i) State water quality standards adopted under section 303(c)(2)(B), due to toxic pollutants; or, (ii) the water quality goals of the CWA.

The list prepared under paragraph (A)(ii) includes all waters affected by toxic, conventional, and non-conventional pollutants from point and non-point sources. It includes all waters whose designated uses are less than the fishable/swimmable goals of the CWA as well as those that are not meeting water quality standards for established, designated uses. The list prepared under paragraph (A)(i) is a subset of the list required by paragraph (A)(ii) and identifies only segments where promulgated State water quality standards are not being met due to toxic pollutants. These two lists must be submitted to EPA not later than February 4, 1989.

Paragraph (B) of section 304(l)(1) requires each State to submit a list of waters for which the State does not expect the "applicable standard" under section 303 of the CWA to be achieved after the requirements of technology-based treatment standards are met due entirely or substantially to the point source discharge of any toxic pollutants listed under section 307(a) of the CWA. This list is also a subset of the (A)(ii) list.

Paragraph (C) of section 304(l)(1) requires States to determine, for each water body on the paragraph (B) list, the specific point source discharges of toxic pollutants believed to be preventing or impairing water quality. The States must also identify the amount of each pollutant discharged by each point source identified in paragraph (C). Like the three lists developed under paragraphs (A) and (B), the point sources identified under paragraph (C) must be submitted to EPA no later than February 4, 1989.

Paragraph (D) of section 304(l)(1) requires States to submit individual control strategies for each segment identified on the list required by paragraph (B) to EPA by February 4, 1989. The amendment requires that these control strategies contain effluent limitations which will result in achievement of the applicable water quality standard as soon as possible, but in no event later than 3 years after establishment of the strategy (June 4, 1992 at the latest). At section 304(l)(2), the amendment requires the Administrator to approve or disapprove control strategies submitted by States by no later than June 4, 1989.

Today's rulemaking codifies the requirements contained in section 304(l)(1) (A), (B) and (C) at § 130.10 of the regulations. Section 304(l) (1)(D) and (2) is codified by today's rulemaking in a new section of the regulations at § 123.46.

In order to meet the deadline in paragraphs (A), (B) and (C) of section 304(l)(1), a draft final EPA guidance document, "Implementation of Requirements under Section 304(l) of the Clean Water Act As Amended" (Sept. 1987) allows States to use existing and readily available data to develop the required lists of waters. At the same time, States should continue to gather new data under existing programs where important information gaps exist. The toxics control program will continue to address emerging problems and ensure prevention of water quality impairment due to toxicity even after section 304(l) deadlines have been met.

2. EPA Review of Individual Control Strategies

Section 304(l)(3) addresses EPA review of State individual control strategies and is codified at § 123.46(b). Section 304(l)(3) requires EPA to implement the requirements of section 304(l)(1) where a State fails to submit a control

strategy or where EPA does not approve a control strategy submitted by the State. The statute requires EPA to perform these tasks within one year and 120 days after the date States are required to submit individual control strategies to EPA. Thus, where EPA action is required under this provision, the Agency must carry out these tasks by June 4, 1990.

Where EPA implements the requirements of section 304(l)(1), EPA must also consider listing those waters for which any person submits a petition for listing. Today's rule adds a new provision at § 123.46 to implement this requirement.

*K. New Source -- Preconstruction Ban*

EPA's existing regulation at § 122.29(c) (4) and (5) addresses requirements for new sources and new dischargers. Section (c)(4)(i) prohibits on-site construction of a new source for which an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) is required prior to final Agency action in issuing an NPDES permit. Section (c)(5) provides that violation of the on-site construction ban is grounds for permit denial.

The United States Court of Appeals for the District of Columbia Circuit recently ruled on the validity of the on-site construction ban for new sources in *Natural Resources Defense Council v. Environmental Protection Agency,* 822 F. 2d 104 (D.C. Cir., 1987). The court held that the construction ban exceeded the agency's authority under either the Clean Water Act or NEPA, and that EPA therefore lacks authority to ban construction of new sources pending permit issuance. Accordingly, the court granted the petition for review of this issue.

In response to the decision of the Court of Appeals for the D.C. Circuit, EPA is removing § 122.29(c) (4) and (5) from the existing NPDES regulations. EPA will address these issues in subsequent rulemaking.

*L. Corrections*

Today's rulemaking also corrects inadvertent omissions, erroneous internal cross-references, and typographical errors in the regulations.

III. Regulatory Analysis

*A. Executive Order 12291: Regulatory Impact Analysis*

Executive Order 12291 requires each Federal agency to determine if a regulation is a "major" rule as defined by the Order and "to the extent permitted by law," to prepare and consider a Regulatory Impact Analysis (RIA) in connection with every major rule. The regulation promulgated today is not a major rule, and therefore is not subject to the Regulatory Impact Analysis (RIA) requirement. This rule does not make changes in the existing law, but merely inserts the WQA provisions into the rules. This package does not incur more than $100 million in costs and fails to qualify as a "major" rule under that standard.

*B. Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq*.) requires each Federal agency to prepare a Regulatory Flexibility Analysis (RFA) when it promulgates a final rule. (5 U.S.C. 604). The purpose of the RFA is to describe the effects the regulations will have on small entities and examine alternatives that may reduce these effects. EPA has determined the Agency does not have to prepare a RFA to determine the impact of today's regulation on State NPDES programs and the waste-discharging industries because today's rule is merely a technical amendment implementing

those provisions in the 1987 WQA that do not require additional interpretation or comments. EPA has concluded that these amendments will not cause a significant impact on small entities.

*C. Paperwork Reduction Act*

The Paperwork Reduction Act is intended to minimize the reporting burden on the regulated community as well as minimize the cost of Federal information collection and dissemination. There are no information collection requirements triggered by this rule except for the listing requirements for State waters required by CWA section 304(l)(1) and implemented in today's rulemaking at 40 CFR 123.46. The public will have the opportunity to comment on this information collection requirement in a companion rulemaking more fully implementing the requirements of section 304(l).

List of Subjects

*40 CFR Part 122*

Administrative practice and procedure; Air pollution control; Hazardous materials; Reporting and recordkeeping requirements; Waste treatment and disposal; Water pollution control; Water supply; Confidential business information.

*40 CFR Part 123*

Hazardous materials; Indians-lands; Reporting and recordkeeping requirements; Waste treatment and disposal; Water pollution control; Water supply; Intergovernmental relations; Penalties; Confidential business information.

*40 CFR Part 124*

Hazardous materials; Waste treatment and disposal; Water pollution control; Water supply; Indians-lands.

*40 CFR Part 125*

Water pollution control; Water treatment and disposal.

*40 CFR Part 130*

Water quality standards.

*40 CFR Part 403*

Confidential business information; Reporting and recordkeeping requirements; Waste treatment and disposal; Water pollution control.

Date: December 15, 1988.

Lee M. Thomas,

Administrator.

For the reasons set out in the Preamble, Chapter I of Title 40 of the Code of the Federal Regulations is amended as follows:

PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS; THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for Part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 122.2 is amended by revising the definition of "point source" and "state" to read as follows:

§ 122.2 Definitions.

* * * * *

*Point source* means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff. (See § 122.3).

* * * * *

*State* means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

* * * * *

3. Section 122.3 is amended by revising paragraph (e) to read as follows:

§ 122.3 Exclusions.

* * * * *

(e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23, discharges from concentrated aquatic animal production facilities as defined in § 122.24, discharges to aquaculture projects as defined in § 122.25, and discharges from silvicultural point sources as defined in § 122.27.

* * * * *

4. Section 122.21 is amended by revising paragraphs (m)(1), (m)(2), (m)(3), (m)(4), (n)(2) and (o) to read as follows:

§ 122.21 Application for a permit (applicable to State programs, § 123.25)

* * * * *

(m) * * *

(1) *Fundamentally different factors.*

(i) A request for a variance based on the presence of "fundamentally different factors" from those on which the effluent limitations guideline was based shall be filed as follows:

(A) For a request from best practicable control technology currently available (BPT), by the close of the public comment period under § 124.10.

(B) For a request from best available technology economically achievable (BAT) and/or best conventional pollutant control technology (BCT), by no later than:

(*1*) July 3, 1989, for a request based on an effluent limitation guideline promulgated before February 4, 1987, to the extent July 3, 1989 is not later than that provided under previously promulgated regulations; or

(*2*) 180 days after the date on which an effluent limitation guideline is published in the Federal Register for a request based on an effluent limitation guideline promulgated on or after February 4, 1987.

(ii) The request shall explain how the requirements of the applicable regulatory and/or statutory criteria have been met.

(2) *Non-conventional pollutants.* A request for a variance from the BAT requirements for CWA section 301(b)(2)(F) pollutants (commonly called "non-conventional" pollutants) pursuant to section 301(c) of CWA because of the economic capability of the owner or operator, or pursuant to section 301(g) of the CWA (provided however that a § 301(g) variance may only be requested for ammonia; chlorine; color; iron; total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by section 301(b)(2)(F)) and any other pollutant which the Administrator lists under section 301(g)(4) of the CWA) must be made as follows:

(i) For those requests for a variance from an effluent limitation based upon an effluent limitation guideline by:

(A) Submitting an initial request to the Regional Administrator, as well as to the State Director if applicable, stating the name of the discharger, the permit number, the outfall number(s), the applicable effluent guideline, and whether the discharger is requesting a section 301(c) or section 301(g) modification or both. This request must have been filed not later than:

(*1*) September 25, 1978, for a pollutant which is controlled by a BAT effluent limitation guideline promulgated before December 27, 1977; or

(*2*) 270 days after promulgation of an applicable effluent limitation guideline for guidelines promulgated after December 27, 1977; and

(B) Submitting a completed request no later than the close of the public comment period under § 124.10 demonstrating that the requirements of § 124.13 and the applicable requirements of Part 125 have been met. Notwithstanding this provision, the complete application for a request under section 301(g) shall be filed 180 days before EPA must make a decision (unless the Regional Division Director establishes a shorter or longer period).

(ii) For those requests for a variance from effluent limitations not based on effluent limitation guidelines, the

request need only comply with paragraph (m)(2)(i)(B) of this section and need not be preceded by an initial request under paragraph (m)(2)(i)(A) of this section.

(3) *Delay in construction of POTW.* An extension under CWA section 301(i)(2) of the statutory deadlines in section 301 (b)(1)(A) or (b)(1)(C) of the CWA based on delay in completion of a POTW into which the source is to discharge must have been requested on or before June 26, 1978 or 180 days after the relevant POTW requested an extension under paragraph (n)(2) of this section, whichever is later, but in no event may this date have been later than January 30, 1988. The request shall explain how the requirements of 40 CFR Part 125, Subpart J have been met.

(4) *Innovative technology.* An extension under CWA section 301(k) from the statutory deadline of section 301(b)(2)(A) for best available technology or 301(b)(2)(E) for best conventional pollutant control technology, based on the use of innovative technology may be reqested no later than the close of the public comment period under § 124.10 for the discharger's initial permit requiring compliance with section 301(b)(2)(A) or 301(b)(2)(E). The request shall demonstrate that the requirements of § 124.13 and Part 125, Subpart C have been met.

* * * * *

(n) * * *

(2) *Delay in construction.* An extension under CWA section 301(i)(1) of the statutory deadlines in CWA section 301 (b)(1)(B) or (b)(1)(C) based on delay in the construction of the POTW must have been requested on or before August 3, 1987.

(3) * * *

(o) *Expedited variance procedures and time extensions.* (1) Notwithstanding the time requirements in paragraphs (m) and (n) of this section, the Director may notify a permit applicant before a draft permit is issued under § 124.6 that the draft permit will likely contain limitations which are eligible for variances. In the notice the Director may require the applicant as a condition of consideration of any potential variance request to submit a request explaining how the requirements of Part 125 applicable to the variance have been met and may require its submission within a specified reasonable time after receipt of the notice. The notice may be sent before the permit application has been submitted. The draft or final permit may contain the alternative limitations which may become effective upon final grant of the variance.

(2) A discharger who cannot file a timely complete request required under paragraph (m)(2)(i)(B) or (m)(2)(ii) of this section may request an extension. The extension may be granted or denied at the discretion of the Director. Extensions shall be no more than 6 months in duration.

* * * * *

5. Section 122.26 is added to read:

§ 122.26 Storm water discharges (applicable to State NPDES programs, see Section 123.25).

(a) *Permit requirement.* (1) Prior to October 1, 1992, a permit shall not be required for a discharge composed entirely of storm water, except for:

(i) A discharge with respect to which a permit has been issued prior to February 4, 1987;

(ii) A discharge associated with industrial activity;

(iii) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more;

(iv) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000;

(v) A discharge which the Administrator or the State, as the case may be, determines contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(2) Permits for discharges from municipal separate storm sewers may be issued on a system or jurisdiction-wide basis.

(3) The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit for discharges of storm water runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or do not come into contact with any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(b) [Reserved].

§ 122.29 [Amended]

6. Section 122.29 is amended by removing subparagraphs (c) (4) and (5).

7. Section 122.41 is amended by revising paragraphs (a)(2), (i) introductory text, and (j)(5) and by adding paragraph (a)(3) to read as follows:

§ 122.41 Conditions applicable to all permits (applicable to State programs, see § 123.25)

* * * * *

(a) * * *

(2) The Clean Water Act provides that any person who violates section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any such sections in a permit issued under section 402, or any requirement imposed in a pretreatment program approved under sections 402(a)(3) or 402(b)(8) of the Act, is subject to a civil penalty not to exceed $25,000 per day for each violation. The Clean Water Act provides that any person who *negligently* violates sections 301, 302, 306, 307, 308, 318, or 405 of the Act, or any condition or limitation implementing any of such sections in a permit issued under section 402 of the Act, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of the Act, is subject to criminal penalties of $2,500 to $25,000 per day of violation, or imprisonment of not more than 1 year, or both. In the case of a second or subsequent conviction for a negligent violation, a person shall be subject to criminal penalties of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or both. Any person who *knowingly* violates such sections, or such conditions or limitations is subject to criminal penalties of $5,000 to $50,000 per day of violation, or imprisonment for not more than 3 years, or both. In the case of a second or subsequent conviction for a knowing violation, a person shall be subject to criminal penalties of not more than $100,000 per day of violation, or imprisonment of not more than 6 years, or both. Any person who knowingly violates section 301, 302, 303, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of the Act, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of

not more than 15 years, or both. In the case of a second or subsequent conviction for a knowing endangerment violation, a person shall be subject to a fine of not more than $500,000 or by imprisonment of not more than 30 years, or both. An organization, as defined in section 309(c)(3)(B)(iii) of the CWA, shall, upon conviction of violating the imminent danger provision, be subject to a fine of not more than $1,000,000 and can be fined up to $2,000,000 for second or subsequent convictions.

(3) Any person may be assessed an administrative penalty by the Administrator for violating section 301, 302, 306, 307, 308, 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act. Administrative penalties for Class I violations are not to exceed $10,000 per violation, with the maximum amount of any Class I penalty assessed not to exceed $25,000. Penalties for Class II violations are not to exceed $10,000 per day for each day during which the violation continues, with the maximum amount of any Class II penalty not to exceed $125,000.

* * * * *

(i) *Inspection and entry.* The permittee shall allow the Director, or an authorized representative (including an authorized contractor acting as a representative of the Administrator), upon presentation of credentials and other documents as may be required by law, to:

* * * * *

(j) * * *

(5) The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or both.

* * * * *

8. Section 122.44 is amended by revising paragraphs (l)(2) and (o) to read as follows:

§ 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

* * * * *

(l) * * *

(2) In the case of effluent limitations established on the basis of Section 402(a)(1)(B) of the CWA, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.

(i) Exceptions -- A permit with respect to which paragraph (l)(2) of this section applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant, if --

(A) Material and substantial alterations or additions to the permitted facility occurred after permit issuance which

justify the application of a less stringent effluent limitation;

(B)(*1*) Information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(*2*) The Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under section 402(a)(1)(b);

(C) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) The permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a); or

(E) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

(ii) *Limitations.* In no event may a permit with respect to which paragraph (l)(2) of this section applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, issued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 applicable to such waters.

* * * * *

(o) *Sewage sludge.* Requirements under section 405 of CWA governing the disposal of sewage sludge from publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established, in accordance with any applicable regulations.

* * * * *

§ 122.62 [Amended]

9. Section 122.62 is amended by amending paragraph (a) to remove existing paragraph (15); and redesignating existing paragraphs (16), (17), and (18) as (15), (16), and (17) respectively.

PART 123 -- STATE PROGRAM REQUIREMENTS

10. The authority citation for Part 123 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

11. Section 123.1 is amended by revising paragraph (g) to read as follows:

§ 123.1 Purpose and scope.

* * * * *

(g)(1) Except as may be authorized pursuant to paragraph (g)(2) of this section or excluded by § 122.3, the State program must prohibit all point source discharges of pollutants, all discharges into aquaculture projects, and all disposal of sewage sludge which results in any pollutant from such sludge entering into any waters of the United States within the State's jurisdiction except as authorized by a permit in effect under the State program or under section 402 of CWA. NPDES authority may be shared by two or more State agencies but each agency must have Statewide jurisdiction over a class of activities or discharges. When more than one agency is responsible for issuing permits, each agency must make a submission meeting the requirements of § 123.21 before EPA will begin formal review.

(2) A State may seek approval of a partial or phased program in accordance with section 402(n) of the CWA.

* * * * *

12. Section 123.46 is added to read as follows:

§ 123.46 Individual control strategies.

(a) Not later than February 4, 1989, each State shall submit to the Administrator for review, approval, and implementation an individual control strategy for each waterbody identified by the State pursuant to section 304(l)(1)(B) of the Act which will produce a reduction in the discharge of toxic pollutants from the point sources identified under section 304(l)(1)(C) through the establishment of effluent limitations under section 402 of the CWA and water quality standards under section 303(c)(2)(B) of the CWA, which reduction is sufficient, in combination with existing controls on point and nonpoint sources of pollution, to achieve the applicable water quality standard as soon as possible, but not later than three years after the date of the establishment of such strategy.

(b) The Administrator shall approve or disapprove the control strategies submitted by any State pursuant to paragraph (a) of this section, not later than June 4, 1989. If a State fails to submit control strategies in accordance with paragraph (a) of this section or the Administrator does not approve the control strategies submitted by such State in accordance with paragraph (a), then, not later than June 4, 1990, the Administrator in cooperation with such State and after notice and opportunity for public comment, shall implement the requirements of CWA section 304(l)(1) in such State. In the implementation of such requirements, the Administrator shall, at a minimum, consider for listing under CWA section 304(l)(1) any navigable waters for which any person submits a petition to the Administrator for listing not later than October 1, 1989.

PART 124 -- PROCEDURES FOR DECISIONMAKING

13. The portion of the authority citation for Part 124 relating to the Clean Water Act continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

14. Section 124.62 is amended by revising paragraph (e) introductory text to read as follows:

§ 124.62 Decision on variances.

* * * * *

(e) The State Director may deny or forward to the Administrator (or his delegate) with a written concurrence a completed request for:

* * * * *

PART 125 -- CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

15. The authority citation for Part 125 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*, unless otherwise noted.

16. Section 125.3 is amended by revising paragraph (a)(2) to read as follows:

§ 125.3 Technology-based treatment requirements in permits.

* * * * *

(a) * * *

(2) For dischargers other than POTWs except as provided in § 122.29(d), effluent limitations requiring:

(i) The best practicable control technology currently available (BPT) --

(A) For effluent limitations promulgated under Section 304(b) after January 1, 1982 and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) and in no case later than March 31, 1989;

(B) For effluent limitations established on a case-by-case basis based on Best Professional Judgment (BPJ) under Section 402(a)(1)(B) of the Act in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established and in no case later than March 31, 1989;

(C) For all other BPT effluent limitations compliance is required from the date of permit issuance.

(ii) For conventional pollutants, the best conventional pollutant control technology (BCT) --

(A) For effluent limitations promulgated under Section 304(b), as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b), and in no case later than March 31, 1989.

(B) For effluent limitations established on a case-by-case (BPJ) basis under Section 402(a)(1)(B) of the Act in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established and in no case later than March 31, 1989;

(iii) For all toxic pollutants referred to in Committee Print No. 95-30, House Committee on Public Works and Transportation, the best available technology economically achievable (BAT) --

(A) For effluent limitations established under Section 304(b), as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b), and in no case later than March 31, 1989.

(B) For permits issued on a case-by-case (BPJ) basis under section 402(a)(1)(B) of the Act after February 4, 1987 establishing BAT effluent limitations, compliance is required as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b), and in no case later than March 31,

1989.

(iv) For all toxic pollutants other than those listed in Committee Print No. 95-30, effluent limitations based on BAT --

(A) For effluent limitations promulgated under Section 304(b) compliance is required as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 304(b) and in no case later than March 31, 1989.

(B) For permits issued on a case-by-case (BPJ) basis under Section 402(a)(1)(B) of the Act after February 4, 1987 establishing BAT effluent limitations, compliance is required as expeditiously as practicable but in no case later than 3 years after the date such limitations are established and in no case later than March 31, 1989.

(v) For all pollutants which are neither toxic nor conventional pollutants, effluent limitations based on BAT --

(A) For effluent limitations promulgated under section 304(b), compliance is required as expeditiously as practicable but in no case later than 3 years after the date such limitations are established and in no case later than March 31, 1989.

(B) For permits issued on a case-by-case (BPJ) basis under Section 402(a)(1)(B) of the Act after February 4, 1987 establishing BAT effluent limitations compliance is required as expeditiously as practicable but in no case later than three years after the date such limitations are established and in no case later than March 31, 1989.

* * * * *

17. Section 125.21 is revised to read as follows:

§ 125.21 Statutory authority.

Section 301(k) provides that the Administrator (or a State with an approved NPDES program, in consultation with the Administrator) may grant a compliance extension for BAT limitations to a discharger which installs an innovative technology. The innovative technology must produce either a significantly greater effluent reduction than that achieved by the best available technology economically achievable (BAT) or the same level of treatment as BAT at a significantly lower cost. The Administrator is authorized to grant compliance extensions to a date no later than 2 years after the date for compliance with the effluent limitation which would otherwise be applicable.

18. Section 125.23 is amended by revising the introductory paragraph to read as follows:

§ 125.23 Request for compliance extension.

The Director shall grant a compliance extension to a date no later than 2 years after the date for compliance with the effluent limitation which would otherwise be applicable, to a discharger that demonstrates:

* * * * *

19. Section 125.24 is amended by revising the introductory paragraph and paragraph (b) to read as follows:

§ 125.24 Permit conditions.

The Director may include any of the following conditions in the permit of a discharger to which a compliance extension beyond the otherwise applicable compliance date is granted:

(a) * * *

(b) Alternative BAT limitations that the discharger must meet as soon as possible and not later than 2 years after the date for compliance with the effluent limitation which would otherwise be applicable if the innovative technology limitations that are more stringent than BAT are not achievable.

20. Section 125.27 is amended by revising paragraph (a) to read as follows:

§ 125.27 Procedures.

(a) The procedure for requesting a section 301(k) compliance extension is contained in §§ 124.62 and 124.63. In addition, notwithstanding § 122.21(m)(4), the Director may accept applications for such extensions after the close of the public comment period on the permit if the applicant can show that information necessary to the development of the innovation was not available at the time the permit was written and that the innovative technology can be installed and operated in time to comply no later than 2 years after the date for compliance with the effluent limitation which would otherwise be applicable.

PART 130 -- WATER QUALITY PLANNING AND MANAGEMENT

21. The authority citation for Part 130 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

22. Section 130.10 is amended by adding paragraph (d) to read as follows:

§ 130.10 State submittals to EPA.

* * * * *

(d) Not later than February 4, 1989, each State shall submit to EPA for review, approval, and implementation --

(1) A list of those waters within the State which after the application of effluent limitations required under section 301(b)(2) of the CWA cannot reasonably be anticipated to attain or maintain (i) water quality standards for such waters reviewed, revised, or adopted in accordance with section 303(c)(2)(B) of the CWA, due to toxic pollutants, or (ii) that water quality which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water;

(2) A list of all navigable waters in such State for which the State does not expect the applicable standard under section 303 of the CWA will be achieved after the requirements of sections 301(b), 306, and 307(b) are met, due entirely or substantially to discharges from point sources of any toxic pollutants listed pursuant to section 307(a);

(3) For each segment of navigable waters included on such list, a determination of the specific point source discharging any such toxic pollutant which is believed to be preventing or impairing such water quality and the amount of each such toxic pollutant discharged by each such source.

PART 403 -- GENERAL PRETREATMENT REGULATIONS FOR EXISTING AND NEW SOURCES OF POLLUTION

23. The authority citation for Part 403 is revised to read as follows:

Authority: Sec. 54(c)(2) of the Clean Water Act of 1977, (Pub. L. 95-217) sections 204(b)(1)(C), 208(b)(2)(C)(iii),

301(b)(1)(A)(ii), 301(b)(2)(A)(ii), 301(b)(2)(C), 301(h)(5), 301(i)(2), 304(e), 304(g), 307, 308, 309, 402(b), 405 and 501(a) of the Federal Water Pollution Control Act (Pub. L. 92-500) as amended by the Clean Water Act of 1977 and the Water Quality Act of 1987 (Pub. L. 100-4).

24. Section 403.13 is amended by revising paragraph (g)(2) to read as follows:

§ 403.13 Variances from categorical pretreatment standards for fundamentally different factors.

* * * * *

(g) * * *

(2) In order to be considered, a request for a variance must be submitted no later than:

(i) July 3, 1989, for a request based on a categorical Pretreatment Standard promulgated before February 4, 1987, to the extent July 3, 1989 is not later than that provided under previously promulgated regulations; or

(ii) 180 days after the date on which a categorical Pretreatment Standard is published in the Federal Register for a request based on a categorical Pretreatment Standard promulgated on or after February 4, 1987.

* * * * *

Corrections

§ 122.3 [Amended]

25. Section 122.3(d) is amended by substituting "300" for "1510" and inserting "Contingency" before "Plan".

§ 122.28 [Amended]

26. Section 122.28 is amended by removing paragraph 122.28(b)(2)(i)(A) and redesignating the existing paragraphs (B), (C), (D), (E) and (F) as (A), (B), (C), (D) and (E) respectively.

§ 122.29 [Amended]

27. Section 122.29(c)(4)(i) is amended by revising the word "coditions" to read "conditions".

§ 122.45 [Amended]

28. Section 122.45(a) is amended by revising the reference to "§ 122.44(j)(2)" to read ' '§ 122.44(k)."

§ 122.62 [Amended]

29. Section 122.62 is amended by revising the reference to "paragraph (c) of this section" contained in the introductory paragraph to read "§ 124.5(c)".

PART 123 -- [AMENDED]

§ 123.27 [Amended]

30. Section 123.27, second note, is amended by revising the reference to "(a)(3)(iii)(B)" to read "(a)(3)(ii)".

PART 124 -- [AMENDED]

§ 124.10 [Amended]

31. Section 124. 10(c)(2)(i) Note is amended by revising "NPDES of 404" to read "NPDES or Section 404."

§ 124.12 [Amended]

32. Section 124.12(a)(2) is amended by inserting a "," after "whenever".

§ 124.56 [Amended]

33. Section 124.56(a) is amended by revising the reference to "§ 122.4" to read "§ 122.44."

§ 124.59 [Amended]

34. Section 124.59(b) is amended by revising the reference to "§ 122.47" to read "§122.49".

§ 124.62 [Amended]

35. Sections 124.62 (c) and (d), are amended by revising the references to "EPA Deputy Assistant Administrator for Water Enforcement" to read "EPA Office Director for Water Enforcement and Permits", and the reference in (d) to "Deputy Assistant Administrator" is revised to read "Office Director".

§ 124.65 [Amended]

36. Section 124.65 is removed and reserved.

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